UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AFSCME COUNCIL 5, LOCAL 3558

and **Case 18-CB-149410**

ST. LUKE'S HOSPITAL OF DULUTH, INC. D/B/A ST. LUKE'S HOME CARE

EMPLOYER'S INITIAL BRIEF

Introduction

St. Luke's Hospital of Duluth, Inc. d/b/a St. Luke's Home Care ("Employer") and AFSCME Council 5, Local 3558 ("Respondent") have been parties to successive collective bargaining agreements, the most recent of which was effective from January 1, 2012, to December 31, 2014 ("Agreement"). The Agreement contained an interest arbitration provision. During the negotiations for a successor collective bargaining agreement, Employer's position was that the provision should be removed, and Respondent's position was that the provision should be included. The parties reached agreement on all open issues except the inclusion of the provision. Respondent bargained to impasse on the issue and then insisted that the issue be submitted to arbitration.

Issue

Whether, by insisting the interest arbitration provision be included in the successor collective bargaining agreement, and by insisting on proceeding to arbitration over the issue, Respondent failed and refused to bargain collectively and in good faith with Employer in violation of Section 8(b)(3) of the National Labor Relations Act ("Act").

Analysis

A. An interest arbitration provision is a permissive subject of bargaining, and Respondent's insistence to impasse on inclusion of such a provision in the successor collective bargaining agreement is unlawful.

"It is well settled that an interest arbitration clause is a nonmandatory subject of bargaining." *Sheet Metal Workers' Int'l. Ass'n, Local 14 v. Aldrich Air Conditioning, Inc.*, 717 F.2d 456, 458 (8th Cir. 1983). "[T]he Board, with court affirmance, consistently has held that...[an interest arbitration] provision is a permissive subject of bargaining." *Sheet Metal Workers Local Union No. 20*, 306 NLRB 834, 839 (1992). An interest arbitration clause is a permissive subject of bargaining because "it relates to the relationship between the parties rather than to wages, hours, or other terms and conditions of employment." *Laidlaw Transit, Inc.*, 323 NLRB 867, 868 (1997). Many other Board decisions confirm such holdings. *See, e.g.*, *Sheet Metal Workers Local 359 (Madison Industries)*, 319 NLRB 668, 670 (1995); *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, 927 (1994); *Greensboro Printing Pressmen, Union 319*, 222 NLRB 893, 896 (1976); *Columbus Printing Pressmen Union No. 252*, 219 NLRB 268, 280 (1975).

"As a general principle, neither party to a collective-bargaining relationship may insist to impasse that the other party bargain about a nonmandatory subject." *Carey Salt Co.*, 360 NLRB No. 38, 2014 WL 495813, 25 (2014). "[I]t is unlawful to insist on 'permissive' subjects as a condition to reaching agreement." *Toledo Blade Co.*, 295 NLRB 626, 627 (1989). *See also N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). For permissive subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not to agree." *Borg-Warner Corp.*, 356 U.S. at 349.

Here, Article 21 of the expired collective bargaining agreement provides for interest arbitration. *Stipulation of Facts*, ¶ 11. Respondent admits that the only issue on which the

parties were not able to reach agreement through negotiations was the inclusion of the interest arbitration provision in the successor collective bargaining agreement. *Id.* at ¶ 12(c). Respondent also admits that it insisted to impasse on that issue. *Id.* at ¶ 13(a). In so doing, Respondent violated the Act.

B. Respondent's insistence on proceeding to arbitration over the inclusion of the interest arbitration provision in the successor collective bargaining agreement is unlawful.

As a general principle, it is an unfair labor practice to insist on proceeding to arbitration over the issue of including an interest arbitration provision in a successor collective bargaining agreement. *See Aldrich Air Conditioning, Inc.*, 717 F.2d at 459; *In re Connecticut State Conference Bd.*, 339 NLRB 760, 767 (2003); *Laidlaw Transit, Inc.*, 323 NLRB at 869. In *Aldrich Air Conditioning, Inc.*, the court considered the enforceability of an interest arbitration provision to require the inclusion of a similar provision in the successor collective bargaining agreement. *Aldrich Air Conditioning, Inc.*, 717 F.2d at 458. The court held that "an interest arbitration clause is unenforceable insofar as it applies to the inclusion of a similar clause in a new collective bargaining agreement." *Id.* at 459. The court affirmed the trial court's decision that an "interest arbitration clause as applied to this situation [is] repugnant to national labor policy." *Id.* at 456–57. *See also Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1089 n.3 (8th Cir. 2004).

Here, Respondent admits that it attempted to invoke Article 21 of the expired collective bargaining agreement to submit the inclusion of the interest arbitration provision to arbitration. *Stipulation of Facts* at ¶ 12(d). In so doing, Respondent violated the Act.

C. An interest arbitration provision cannot be self-perpetuating, as is the provision here.

The Board has held that even if an interest arbitration provision is self-perpetuating by its own terms, a party to the collective bargaining agreement can still insist on removing that

provision from the successor collective bargaining agreement. *In re Connecticut State Conference Bd.*, 339 NLRB at 767-68; *Laidlaw Transit, Inc.*, 323 NLRB at 869; *Sheet Metal Workers, Local 59*, 227 NLRB 520, 520 (1976). As the Board has held:

> There are several important reasons why a new contract arbitration clause should not be enforceable to perpetuate inclusion of the clause in successive bargaining agreements. The contract arbitration system could be self-perpetuating: a party having once agreed to the provision, may find itself locked into that procedure for as long as the bargaining relationship endures. Exertion of economic force to rid oneself of the clause is foreclosed, for the continued inclusion of the term is for resolution by an outsider. Parties may justly fear that the tendency of arbitrators would be to continue including the clause, for that is exactly what happened in this case.

In re Connecticut State Conference Bd., 339 NLRB at 767 (quoting *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161, 1163 (5th Cir. 1976)). *See also Plumbers, Local Union No. 387*, 266 NLRB 129, 135 (1983); *Sheet Metal Workers, Local 59*, 227 NLRB 520, 520 (1976).

Here, Respondent relies upon Article 21, Section 21.3, to argue that the interest arbitration provision in the expired collective bargaining agreement is not self-perpetuating. Section 21.3 provides, in relevant part, as follows:

> The arbitration panel in rendering its decision **shall** incorporate therein a provision that this arbitration clause (Article XXI) shall be a part of the succeeding contract, unmodified, except the arbitration panel **may** impose an expiration date on the provisions of this Article XXI for any Labor Agreement expiring during or after the calendar year 2005.

Stipulation of Facts, ¶ 11(b) (emphasis added). Respondent argues that this provision is not self-perpetuating because it permits the arbitration panel to impose an expiration date on the provision. Significantly, Respondent does not cite to any authority in support of its argument. Moreover, Respondent's argument fails to recognize that the expiration date language is permissive, not mandatory. Since the language is permissive, the rationale in the above Board decisions applies here.

Conclusion

By insisting to impasse that Employer agree to include the interest arbitration provision in the successor collective bargaining agreement and by insisting on proceeding to arbitration over the issue, Respondent violated Section 8(b)(3) of the Act.

Respectfully submitted,

Dated: February 25, 2016

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By: _____

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